

## *Chapter 1*

# **Market Regulations, Competition Policy and the Role of Competition Commission of Pakistan (CCP)**

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### **1. INTRODUCTION**

Market regulations are exercised to ensure efficiency in production, streamline standard-setting, and provide protection to consumers by ensuring quality products at competitive prices. Alternatively, regulations are aimed at providing a legal framework to create a business environment based on healthy competition for improving economic efficiency, developing competitiveness, and protecting consumers from anti-competitive practices. Competition, thus, is playing an important role in the functioning of markets. Accordingly, it has always been on the forefront of academic discourse.<sup>1</sup> Economic freedom or competition in markets ensure efficiency from both the production and consumption sides of the market. On the resource allocation side, competition is presumed to spur investments, innovations, and productivity, all leading to reduced cost of production. On consumers' side, competition ensures a variety of quality products and services at cheaper prices, resulting in an enhanced consumer welfare. At aggregate level, market competition ensures economic growth, help in curbing poverty and inequality in countries. For instance, a recent study from Mexico on two markets, i.e., mobile telecom and corn products, shows that an increase in competition from 4 to 12 firms in the mobile telecom industry and reducing the market share of the oligopoly in corn products from 31.2 percent to 7.8 percent result in a combined reduction of poverty headcount by 0.8 percentage points together with a decline of 0.32 points in the Gini coefficient.<sup>2</sup>

Non-competitive behaviour can be defined in a number of ways; however, broadly, a market with firms in dominant position is characterised as non-competitive. For instance, if firms with market power are raising their prices, limiting sales, or charging discriminatory prices, the firms are deemed as guilty of a dominant position. In general, low investment rate in the country, efficiencies associated with economies of scale, firms' crowding out of existing or potential competitors either deliberately or via innovation, increased merger or acquisition activities etc. are causing dominance in market or lack of competitive practices in the market. In addition, regulatory barriers to entry such as licensing requirements for entry into a market, inappropriate government policies, or the

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<sup>1</sup>Haque, N., Ahmed, V., & Shahid, S. (2011). Reforms for competitive markets in Pakistan.

<sup>2</sup>Rodriguez Castelan, C., Araar, A., Malasquez Carbonel, E. A., Olivieri, S. D., & Vishwanath, T. (2019). *Distributional Effects of Competition: A Simulation Approach*. The World Bank.

power of vested interest to block necessary reforms etc. put a bearing on competition.<sup>3</sup> Competition policy is presumed to prohibit such behaviours. In fact, competition policy incorporates the structures that governments have in place for the regulation of markets and monopolies. Competition policy generally aims to: prevent growth of monopoly power; prevent abuse of monopoly power and restrictive trading practices; investigate suspected abuses of monopoly power and recommend policy decision; and reduce barriers to entry and keep markets contestable. In this article, we are focusing on three aspects. First, we provide stylised facts about market competition in Pakistan. Second, we want to highlight the purpose and structure of the Competition Commission of Pakistan (CCP). Finally, we want to see what CCP has achieved so far, given its organisational capabilities and jurisdictions and what is the way forward in this regard.

## **2. STYLISTED FACTS ABOUT COMPETITION AND MARKETS IN PAKISTAN**

Markets in Pakistan are not as competitive as is stressed in economic theory. Instead, they are presumed to be concentrated and controlled by a handful of powerful lobbies, having close ties with either government officials or politicians. Despite a long tradition of the market economy, competition is still poorly regulated in Pakistan. In order to highlight this situation, we summarise the Bertelsmann Stiftung's Transformation Index (BTI) with regard to organisation of the market and competition in table 1. The BTI analyses and evaluates the quality of democracy, a market economy and political management in 128 developing and transition countries. Based on their status score of 1 to 10, a country is characterised as 'developed' in terms of market economy if its score is 8 and above. Likewise, a country is grouped as 'functioning' if it has a score between 7 and 8. A status ranking between 5 and 7 means as 'functional flaws' group, and a score between 3 and 5 means that the country is 'poorly functioning' and a score below 3 means the country enjoys a 'rudimentary' status. As is evident from the table, in 2020, Pakistan remains among the 'functional flaws' group of countries in terms of the overall Organisation of the Market and Competition. In terms of Market Organisation, the situation has been worsened since 2006 as the status of the country has been deteriorated from 'functional flaws' group of countries in 2006 to the group of 'poorly functioning' countries in 2020. In terms of Competition Policy, Pakistan has been persistent since 2006 as the country remains in the list of 'poorly functioning' countries since 2006. Though, in terms of Trade Liberalisation and Banking System, the country is performing a bit better by being in the group of 'functioning' countries, but it is still lower than the advanced countries in terms of these characteristics. All these statistics imply that markets in Pakistan are poorly organised, with negligible levels of competitive practices are prevailed in the marketplace. According to the BTI Report 2020, Pakistan has high market concentration which renders economic or market powers to the so-called 22 families and the military. Market constraints are causing deterioration to the formal sector, with around 70 percent of firms are classified as small.<sup>4</sup> In particular, the costs

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<sup>3</sup>Furman, J. (2016). Benefits of competition and indicators of market power. *Washington: Council of Economic Advisers (Issue Brief), The White House.*

<sup>4</sup>Haque, N. (2020). Framework for economic growth. Islamabad: Pakistan Institute of Development Economics

associated with the formalisation of large businesses, the aspiration for the business community to expand in scale seems to be low. If we compare Pakistan with other comparable countries, we have only 8 percent of Pakistani firms as ‘large’ compared with 54 percent in Sri Lanka, 52 percent in Indonesia, and 47 percent in Thailand. Overall, a managed float exchange rate, protection for investors, lack of efficient and transparent competition laws, poor contract enforcement mechanism, red-tapism, subsidies etc. are among the major constraints to market competition in Pakistan.<sup>5</sup>

Table 1

*Ranking of Organisation of the Market and Competition*

Year	Country	Organisation of the Market and Competition	Market Organisation	Competition Policy	Liberalisation of Foreign Trade	Banking System
2020	Bangladesh	5.8	5	6	7	5
2006		5.8	5	7	7	4
2020	China	6.8	6	7	8	6
2006		5	4	5	7	4
2020	India	6.5	6	7	7	6
2006		6.25	6	6	6	7
2020	Malaysia	7.5	7	7	7	9
2006		6.25	7	5	6	7
2020	Pakistan	5.3	4	4	7	6
2006		5.5	5	4	6	7
2020	Sri Lanka	6.5	7	5	7	7
2006		8.25	8	9	8	8
2020	Thailand	6.3	5	5	7	8
2006		7.75	7	7	9	8
2020	Turkey	7.8	7	7	8	9
2006		7	7	7	7	7

Source: Author compilation from Bertelsmann Transformation Index (BTI), 2020.

Additionally, according to the Global Competitiveness Report (GCR) 2019, Pakistan is ranked at 110 out of 141 countries on the Global Competitiveness Index (GCI) which is very low as compared to the comparable countries (see table 2).<sup>6</sup> Again, the report identify corruption, ambiguous tax system, government instability, financial constraints, inadequate infrastructure, poor capacity to innovate as the main hurdles that dampen competitive economic activities in Pakistan. If we decompose the GCR ranking in terms of its 12 pillars and 103 indicators, Pakistan’s ranking related to institutions stood at 107<sup>th</sup> position, infrastructure 105<sup>th</sup>, ICT adoption 131<sup>st</sup>, macroeconomic stability at 116<sup>th</sup>, health 115<sup>th</sup>, skills 125<sup>th</sup>, product market 126<sup>th</sup>, labour market 120<sup>th</sup>, financial system 99<sup>th</sup>, market size 29<sup>th</sup>, business dynamism 52<sup>nd</sup>, and innovation capacity 129<sup>th</sup> position in accordance with Global Competitiveness Index. All these statistics suggest that we need significant improvements, especially in innovation capacity, skills development, macroeconomic stability, labour and product markets etc. in order to have a pro-growth and competitive private sector.

<sup>5</sup>BTI, 2018.

<sup>6</sup> The GCR is a yearly report published by the World Economic Forum which ranks countries since 2004 based on the Global Competitiveness Index (GCI).

Table 2

*Global Competitiveness Index (2008-2019)*

	2019	2018	2016	2014	2012	2010	2008
Bangladesh	105	99	107	110	108	106	107
China	28	27	28	29	26	29	34
India	68	40	55	60	56	49	48
Indonesia	50	36	37	38	46	54	54
Malaysia	27	23	18	24	21	24	21
Nepal	108	88	100	117	125	125	114
Pakistan	<b>110</b>	<b>115</b>	<b>126</b>	<b>133</b>	<b>118</b>	<b>101</b>	<b>92</b>
Sri Lanka	84	85	68	65	52	79	70
Turkey	61	53	51	44	59	61	53

Source: World Economic Forum, 2019.

As far as market competition is concerned; it is constrained in both the domestic as well as foreign markets. Domestic competition is constrained by structural regulatory barriers to entry, market dominance by few firms, lack of effective competition policies etc. (see Table 3). Likewise, the level of foreign competition is low due to incidences of trade barriers which are still relatively higher. Moreover, the trade barriers indirectly affect domestic competition by curbing the availability of inputs or making it more costly. All these obstacles suggest that, in order to encourage procompetitive businesses, effective competition laws and policies should be promulgated. Due to recent digitalisation and some other improvements in business regulations, Pakistan climbed 28 places and rose to a rank of 108 in the global ease of doing business rankings 2020 from 136 in 2019. The report acknowledges ten countries, including Pakistan, that improved significantly on the ease of doing business after implementing regulatory reforms. The efforts focused primarily on the areas of starting a business, dealing with construction permits, getting electricity, paying taxes, and trading across borders (Figure 1). Still, a lot needs to be done in order to reap the potential benefits of a competitive private sector. For instance, we are still poor in terms of the intensity in local competition, number of procedures to start a business, trade barriers, or capacity to innovate etc.

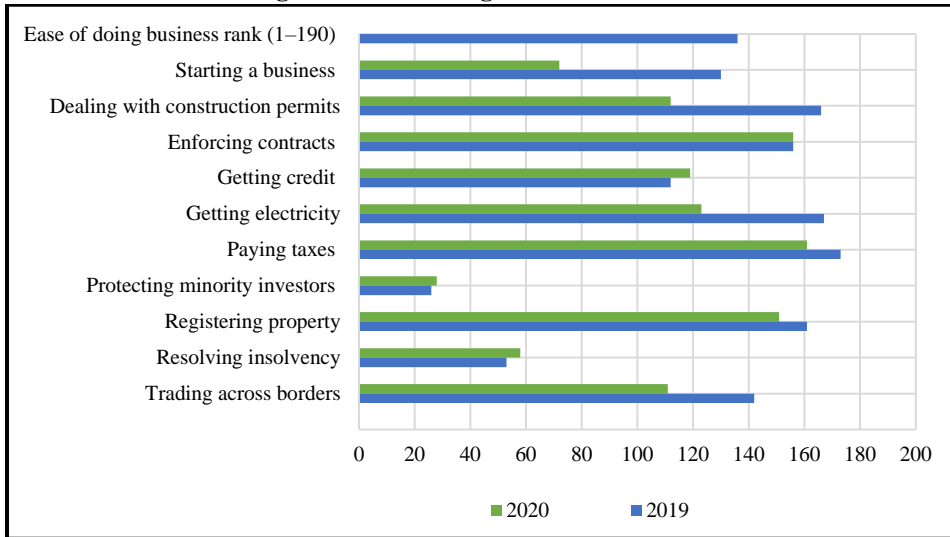
Table 3

*Sub- Components of Global Competition Index*

	2018-19	2013-14	2007-08
Property rights	110	122	92
Irregular payments and bribes	102	123	-
Judicial independence	80	55	79
Favouritism in decisions of government officials	62	130	83
Burden of government regulation	64	82	70
Efficiency of legal framework in settling disputes	83	112	-
Intensity of local competition	<b>120</b>	<b>79</b>	<b>105</b>
Extent of market dominance	<b>71</b>	<b>77</b>	<b>84</b>
Effectiveness of anti-monopoly policy	<b>70</b>	<b>85</b>	<b>66</b>
Effect of taxation on incentives to invest	<b>85</b>	<b>82</b>	-
No. procedures to start a business	<b>125</b>	<b>116</b>	<b>85</b>
No. days to start a business	<b>93</b>	<b>91</b>	<b>39</b>
Prevalence of trade barriers	<b>106</b>	<b>92</b>	<b>95</b>
Prevalence of foreign ownership	112	121	64
Burden of customs procedures	93	91	82
Trade tariffs, % duty	<b>135</b>	142	110
Capacity for innovation	<b>129</b>	49	71

Source: World Economic Forum, 2019.

**Fig. 1. Ease of Doing Business Indicators**



Source: World Bank, Doing Business various reports.

Given these international rankings, the implications of limited competition are huge in terms of formalisation of businesses, size of the businesses, and the development of a competitive private sector. For instance, Pakistan has a huge fraction of informal economy, ranging from around 30 percent to 60 percent of GDP, depending upon the definition employed (International Finance Commission (IFC), 2021). This translates into the range of \$100 billion to \$190 billion a year. If you define it in terms of employment, then the share of employment in informal economy is 71.4 percent of non-agriculture employment. A critical feature of informal employment is that formal workers earn on average 120 percent more than informal workers. Second, it enhances unfair competition, especially from the perspective of formal companies. According to the World Enterprise Survey of the World Bank, nearly half of formal companies face unfair competition from unregistered or informal companies (World Bank, 2015). During a recent business roundtable discussion in Islamabad with large manufacturers, some business leaders admitted off-the-record that they operated three or four informal plants for every formal plant (IFC, 2021). It is encouraged by the confiscatory behaviour of tax officials and inspectors as is argued by them during the roundtable. They also argued that any enterprise that broke this pattern would go out of business with operating profits seldom exceeding ten percent, and taxes and official fees often exceeding 40 percent.

With regard to size, Pakistan’s SME sector, by some estimates, accounts for around 90 percent of all businesses and it accounts for roughly 80 percent of the non-agricultural labour force, 30-40 percent of GDP, and 25 percent of exports. The average SME in Pakistan has been in operation for around 20 years while the average large business has been in operation for around 30 years. Growth oriented business are rare, and most businesses do not grow over their life cycle. The relatively old age of SMEs suggests that they do not have the resources or do not have the incentives to invest and grow. The Government of Pakistan has prepared a draft SME Policy that would help strengthen the enabling environment for SMEs. Moreover, 74 percent of survey

businesses in the World Enterprise Survey operate as a sole proprietorship compared to a global average of 41 percent. It means that the enterprise is owned and managed by one person without legal distinction between the owner and the business entity. This structure curbs the expansion potential of said entities by limiting access to finance and other advantages that come with other structures that separate the legal obligations of the owner and the enterprise. It also leaves individuals, and families, exposed to the risks of bankruptcy. A lack of dynamism and competitiveness means that the private sector has not been able to attract much needed efficiency enhancing FDI, which through knowledge spillovers can boost productivity across supply chains. Only 1.5 percent of all firms surveyed as part of the enterprise survey indicated to having 10 percent or more foreign ownership, in comparison to 12.3 percent average globally.

### **3. COMPETITION COMMISSION OF PAKISTAN**

The Competition Commission of Pakistan (CCP) is an independent quasi-regulatory and quasi-judicial body that helps to ensure healthy competition between companies for economic efficiency.

The Commission prohibits abuse of a dominant position in the market, certain types of anti-competitive agreements, and deceptive market practices. It also reviews mergers of undertakings that could result in a significant lessening of competition. Combined with its advocacy efforts, the Commission seeks to promote voluntary compliance and develop a ‘competition culture’ in the economy. The Commission was established in October 2007 under the Competition Ordinance 2007<sup>7</sup>, which was later passed as the Competition Act in October 2010.<sup>8</sup> Major aim of the Competition Ordinance was to provide for a legal framework to create a business environment based on healthy competition for improving economic efficiency, developing competitiveness, and protecting consumers from anti-competitive practices. Prior to the Ordinance, Pakistan had an anti-monopoly law namely ‘Monopolies and Restrictive Trade Practices (Control and Prevention) Ordinance’ (MRTPO) 1970. The Monopoly Control Authority (MCA) was the organisation to administer this Law. In the fast changing global and national economic environment, the MRTPO, 1970 was inadequate to address competition issues effectively. In other words, the 1970’s outdated law was inadequate for transition to modern market economy. Second, the MCA was not able to meet the expectations of businesses and the consumers due to several limitations in the law. Third, the first-generation reforms that liberalised the economy and encouraged the private sector required a competition policy that could promote and protect competition and innovation. Accordingly, the government of Pakistan launched a programme to develop Competition Policy as a key “second generation reform” initiative. Towards this end, the Ministry of Finance and the MCA in collaboration with the World Bank and the Department for International Development (DFID), UK, replaced the MRTPO with the Competition Ordinance 2007. After getting approved, Competition Ordinance 2007 finally transformed into Competition Act 2010. The Competition Act, 2010 considers the current economic realities as well as corrects the deficiencies of the MRTPO related to definitional aspects, coverage, penalties, and other procedural matters.

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<sup>7</sup>The Competition Ordinance, 2007 (Published in the Gazette of Pakistan Extraordinary, Oct. 02, 2007).

<sup>8</sup>The Competition Act, 2010, Act No. XIX of 2010 (Published in the Gazette of Pakistan Extraordinary, Oct. 13, 2010).

In line with modern competition regimes, the law adopts a ‘carrot and stick’ approach - the law provides for higher fines combined with imprisonment for non-compliance; on the other hand, the carrot is sweetened with sophisticated leniency provisions that may eventually lead to no fines and imprisonment, subject to certain conditions. To maintain high standard of evidence for unearthing secret cartels, the Competition Commission has legal powers to conduct searches and inspections.

### **3.1. Mandate of CCP**

Anti-competitive business conduct can have harmful effects on the level of competition in the economy and thus, on consumers. The Competition Act, 2010, prohibits undertakings from abusing a dominant position in the market, participating in anti-competitive agreements, and resorting to deceptive marketing practices that could result in a transaction based on incorrect or inaccurate information. It also reviews mergers between undertakings that could result in significant impediments to effective competition. Through advocacy, the Commission encourages voluntary compliance and promotes a ‘competition culture’ to take root in the economy. The Competition is based on international best practices, considers the current economic realities and corrects the deficiencies of the Monopolies and Restrictive Trade Practices Ordinance (MRTPO) of 1970 related to definitional aspects, coverage, penalties, and other procedural matters. It covers all sectors of the economy, regardless of their public or private ownership.

### **3.2. Organisational Structure**

In order to make policy decisions and provide guidance to the various departments, the Commission serves as collegiate body. The Commission comprises of four members, including the Chairperson. Current members are Ms. Rahat Kaunain Hassan who is also the chairperson of the commission, Ms. Shaista Bano, Ms. Bushra Naz Malik, and Mr. Mujtaba Ahmed Lodhi. The commission has 5 DGs and a secretary and Registrar. The DG Competition Policy is focusing on analysis and recommendations to address emerging challenges to competition. DG Research is in charge of the research activities of the commission on various aspects of competition policy. There is also a DG for Advocacy and Media, along with a DG for Administration and Finance, and a DG for Cartel & Trade Abuse.

The Commission Secretariat, headed by the Registrar of the commission, oversees the conduct of business of the Commission under the approved procedures. Among the powers and duties of the secretariat to the Commission are, inter alia, to represent the Commission at any forum as authorised by the Commission, to issue notices and minutes of the meetings of the Commission and certifying the decisions or documents used in hearings by the Commission. The Chair may assign other powers and duties to the secretariat based on organisational exigencies.

### **3.3. Critical Analysis of the Role of CCP**

There are four essential aspects of the Competition Act. First, Section 3 is about prohibiting abuse of dominant position by undertaking(s) of all such anti-competitive practices that prevent, restrict, reduce, or distort competition in the relevant market. Such practices include predatory pricing, tie-ins, boycotting and refusal to deal. Second,

Section 4 is about prohibiting agreements or practices that restrict free trading and competition between business entities. This includes in particular the repression of cartels; obtaining individual or block exemptions with respect to prohibited agreements provided, it can be established that, benefits of the transaction outweigh its adverse effect. Third, Section 10 is about prohibiting deceptive marketing practices which aim at protecting consumer interests and enhance consumer welfare. Fourth, Section 11 is about supervising the mergers/acquisitions of undertaking(s), including some joint ventures. Mergers/acquisitions that are considered to threaten the competitive process can be prohibited altogether, or approved subject to conditions as deemed appropriate under the circumstances.

As is stated earlier, CCP has the mandate to ensure free competition in all spheres of commercial and economic activities in order to promote economic efficiency and to protect the rights of the consumers. Its regulatory function is mainly processing or granting clearance to mergers or granting exemptions in respect of prohibited agreements. As opposed to the MRTPO, the Competition Act does not seek to curb or reduce a dominant position; it prohibits the abuse of dominance. Although it provides a threshold in terms of market share beyond which there is a presumption of dominance, it does not rule out either dominance or abuse thereof at a level lower than the threshold for market share. Unlike the MRTPO, which prohibited only “restrictive” trade practices resulting in unreasonable lessening of competition, the Act prohibits any agreement that reduces competition within the relevant market whether or not it is “unreasonably restrictive”. Furthermore, CCP has power to grant block exemptions on grounds of efficiency or economic merit which did not exist earlier. The Act stipulates *ex-ante* merger control procedure i.e., mandatory procedure for review and prior clearance of mergers and acquisitions meeting the thresholds specified by the CCP. Under the Act, the requirement of registration of agreements has been done away with thus eliminating unnecessary transactions or compliance costs.

In order to create awareness regarding competition issues, CCP has to engage itself in advocacy. Holding of open public hearings on matters affecting the state of competition in Pakistan and the issuance of non-binding opinions in this connection is another important aspect in which Act differs from the MRTPO. Unlike the MRTPO, the power of forcible entry, to search any premises and to grant leniency or a reprieve as may be merited under the Act also considerably strengthens the investigative capacity of the CCP. To preserve independence of the CCP, a certain degree of protection from arbitrary removal and security of tenure is given under the Act. Tied sources of funding to meet operational needs has been catered for without resort to subventions from the Federal Budget. The MRTPO had no such provision, and the MCA was wholly dependent upon allocations from the Federal Budget. Penalties under the Act are much higher than those provided in the MRTPO to make implementation effective. Recovery powers are also not restricted to recovery as arrears of land revenue, but it can now be through attachment, and appointment of receiver. Orders of the MCA were appealable to the High Court. Under the Act, an order by a single member or an authorised officer can be appealed before an Appellate Bench (consisting of at least two members). However, judicial redress can always be sought against the final orders of the CCP. Any person aggrieved by order of the CCP comprising two or more Members or of the Appellate Bench can prefer an appeal to the Supreme Court.



### **3.4. Some further Clarifications about the Act**

In this section, we are providing further explanation of the violations which are formally provided in the Competition Act.

#### **3.4.1. Abuse of Dominant Position**

Under the Act, dominance is not stated to be in terms of percentage alone, but it is also deemed to exist if an undertaking or undertakings has/have the ability to behave to an appreciable extent independent of competitors, customers, consumers and suppliers. However, it is important to appreciate and emphasise that dominant share is not barred by the Act; it is the abuse thereof that constitutes an offence. Undertakings can even hold 90 percent of the market share and they may be allowed to continue to do so, provided they do not abuse such dominance. Significantly, the behavioural aspect of an undertaking or undertakings having even less than 40 percent of share in the market may manifest dominance if such undertaking on its own or with other undertakings can act independent of its competitors, customers, consumers and suppliers and engage in practices which prevent, restrict, reduce or distort competition in the relevant market. The CCP can take cognizance of the matter, only when such dominance is abused as envisaged under section 3 of the Act. Presumption of dominance under the Act has been kept at forty (40) percent share in the relevant market, although globally it varies between 20 percent to 70 percent.

#### **3.4.2. Prohibited Agreements**

In line with best international practices, and similar to EU and Singapore, the Act prohibits all agreements (including vertical or horizontal agreements) that have the 'object' or 'effect' of preventing, restricting or reducing competition. Each of the terms, 'object' and 'effect' in Section 4 of the Act entails a distinct feature. Agreements having the "object of preventing, restricting or reducing competition" are those to which the per se rule applies e.g. agreements directly affecting price or output are considered inherently suspect. Since, the anti-competitive effect of such agreements is readily apparent they are made subject to per se treatment and there is no further need to probe into its effects. As for examining the anti-competitive effects of an agreement the "rule of reason" applies. It is explicitly stated in sub-section (3) of Section 4 of the Act that any agreement entered into in contravention of the provision in sub-section (1) (of Section 4) shall be void. Therefore, parties to such agreements cannot insist upon the performance of their obligations arising from such agreement. Besides declaration of such agreements as void under law, the CCP is empowered to annul such an agreement or require the undertaking concerned to amend the agreement and not to repeat the prohibitions. Additionally, penalties can also be imposed under Section 38 of the Act. While the door to exemption is open, it has narrow scope and places the onus of proof on the parties to the agreement. Exemption can be granted with respect to prohibited agreements if it can be shown in terms of Section 9 that:

- (a) It contributes to the efficiency or production;
- (b) It promotes technical or economic progress, while allowing consumers a fair share of the resulting benefit; or

- (c) the benefits clearly outweigh the adverse effects of absence or lessening of competition.

### **3.4.3. Deceptive Marketing Practices**

The power given to the CCP to prevent deceptive marketing practices is a natural corollary to its mandate and aims at protecting consumer interests and enhances consumer welfare. The consumer protection mandate is in line with the international trend followed by inter alia EU, US, Canada, Australia and New Zealand. Certain practices have been deemed to constitute deceptive marketing practices under law. Such practices are not easily avoidable by the consumers and are likely to cause substantial injury to them. It may be relevant to add that certain other laws may also cover such practices; however, they are narrower and distinct in scope. Also, enforcement provisions in the Act are far more effective, as CCP is empowered to impose significant penalties as opposed to nominal and non-detering penalties under such other laws. It must also be appreciated that the Act is by no means extraordinary in providing higher penalties as a deterrent against deceptive practices. As compared to Pakistan, EU and Canada enjoy much wider scope and authority with respect to curtailing deceptive market practices. CCP within its umbrella has setup the Office of Fair Trading particularly for the purposes of enforcing Section 10 of the Act.

### **3.4.4. Mergers and Forcible Entry**

It is important here to note that out of around 110 countries with Competition Law regimes, less than ten (10) have adopted a voluntary notification regime for merger clearance. Pakistan, India and EU are part of the overwhelming majority of jurisdictions which prescribe a mandatory notification regime. The substantive test to be applied in merger control is to see whether the merger/acquisition substantially lessens competition. In Pakistan, similar to EU and India, clearance would only be required with respect to such mergers/acquisitions that cross certain thresholds initially prescribed with reference to turnover or the value of gross assets of the undertaking(s). Here, it is indeed critical to appreciate that the term „merger“ as used under the Act. Clearly, has a much wider scope and meaning than it is generally understood, particularly in the context of company law. In terms of clause (h) of sub-section (1) of Section 2 of the Act “merger” means: “Merger” means the merger, acquisition, amalgamation, combination or joining of two or more undertakings or part thereof into an existing undertaking or to form a new undertaking: and expression “merger” means to merge, acquire, amalgamation, combine or join, as the context may require. It may be noted that the thresholds prescribed under Competition (Merger Control) Regulation, 2007, (the “CMCR”)<sup>1</sup> for seeking clearance may be rightly perceived as somewhat low but these are likely to be gradually raised over time based on experience and a better understanding of commercial exigencies. There has already been a modification in the initial thresholds prescribed, and these are expected to be revised from time to time. As we traverse the learning curve acquiring through experience a more pragmatic assessment of what thresholds should be allowed – possibly even sector or sub-sector specific – to rationally proceed to make necessary adjustments in the prescribed thresholds. There has been a debate on enforcing mandatory regime in Pakistan. It seems clear that the option of adopting voluntary regime over mandatory

regime would be retrogressive. Why should we not remain part of the progressive overwhelming majority? The list of countries having compulsory notification includes Argentina, Brazil, South Korea, Canada, France, Germany, Israel, Japan, South Africa, EU and US. Even the UK is in the process of moving to a fully mandatory regime from its current quasi-voluntary regime. Since compulsory notification brings in greater certainty and reduces business risks associated with combining, most countries in the world have opted for compulsory notification. Mandatory regimes are more effective in preventing anti-competitive concentration/merger/takeover as it is almost impossible to undo a merger once it has been implemented; reverting to voluntary regime, therefore, is not a pragmatic option.

Like various other jurisdictions, the power of forcible entry without warrant has been kept in the Act in view of its effectiveness. The law provides an inbuilt mechanism of how this power is to be exercised. First, the officer to enter and search premises must be authorised by CCP. Next, if the undertaking refuses to allow CCP to exercise the power, without “reasonable cause” a deliberation process is provided. The investigating officer is required to obtain a written order signed by two members of CCP, before entering the premises by force. The power to summon, search, forcibly enter any place or order production of records etc., are similar to those enjoyed by SECP; hence, there is nothing exceptional under municipal law about such powers being conferred upon CCP. This is also in line with global practice in the enforcement of competition norms.

#### **3.4.5. Imposing and Recovering Penalties, Overlapping Powers**

Penalties (if) recovered by CCP shall form part of the CCP Fund in terms of Section 20 of the Act. However, the Fund does not consist of penalties alone (as wrongly propagated). It also includes allocations by the Government; contributions from local and foreign donors or agencies with the approval of the Federal Government; returns on investments and income from assets of the CCP; all other sums which may in any manner become payable or vested in the CCP; and a percentage of the fees and charges levied by other regulatory agencies in Pakistan as prescribed by the Federal Government. Moreover, penalties forming part of the CCP Fund is very much in line with the laws administered by sector specific regulators such as Securities & Exchange Commission of Pakistan (SECP), National Electric Power Regulatory Authority (NEPRA), Oil & Gas Regulatory Authority (OGRA) or Pakistan Telecommunication Authority (PTA) etc. In any case, CCP cannot spend more than its approved annual budget. Further, to ensure transparency and accountability, CCP is required to maintain proper accounts which are to be audited by the Auditor General of Pakistan or by a firm of Chartered Accountants nominated by the Auditor General of Pakistan. The annual report is to be published in the official gazette and to be laid before both the houses of Majlis-e-Shoora (Parliament).

The power to vary the rates and number of penalties is subject to two requirements: it should be necessary in the public interest; and it can only be done with the approval of the federal government. As regards the issue of excessive delegation, there are two inbuilt checks (including the scope to vary penalties) provided in the Act. When the parent legislation gives the mandate and prescribes parameters within the statute itself, the question of excessive delegation does not arise. Moreover, the power to vary does not necessarily mean power to increase, as variation can also be downward. Looking

generally at judicial precedents in Pakistan, the likelihood for courts to interfere, and hold delegation of such nature as excessive is remote.

The CCP is not to be viewed as usurping the important functions of sector specific regulators. Consistent with its legislative mandate and also consistent with contemporary best practices extant in the civilised world, the CCP role is confined to enhancing economic efficiency by acting as a bulwark against anti-competitive practices in all sectors of the economy. The CCP makes do efforts to consult relevant agencies. A Competition Consultative Group (CCG) has already been set up which comprises about 15 participants drawn primarily from sectors specific regulators, relevant professional bodies the private sectors and academics. This forum meets periodically to consider any concerns and suggestion and to get informal feed-back and guidance for CCP's on-going activities and proposed initiatives. Most comforting factor is that despite initial reluctance by some of the regulator's CCG has been able to achieve participation from all sector specific regulators, including State Bank of Pakistan.

#### 4. DECISIONS OF CCP

Though, the Commission is a crucial player in ensuring competitive markets but it is not the only player, particularly in the case of Pakistan where the economy has moved from nationalised to the private sector economy. This transition phase had achieved some good results in the form of increased growth in the private sector, like in the telecom and banking sector. In line with modern competition regimes, the law adopts a "carrot and stick" approach - the law provides for higher fines combined with imprisonment for non-compliance. On the other hand, the carrot is sweetened with sophisticated leniency provisions that may eventually lead to no fines and imprisonment, subject to certain conditions. To maintain a high standard of evidence for unearthing secret cartels, the CCP has legal powers to conduct searches and inspections.

There are two programs, leniency and informed programs; the former is designed to give incentives to cartel members in approaching the competition authority, confess their participation in a cartel. The leniency comes from the cartel's participants, and the leniency applicant must be part of the cartel. However, for the later program, it can be anyone who has factual information about the existence of a cartel. They have an incentive of up to 5 billion PKR to the informant so that is divided into different stages and has that in place since 2012 and there are several applications.<sup>9</sup> For example, Siemens claimed leniency provisions under Regulation 3 or 4(1) of the Leniency Regulations. Under this regulation, CCP can provide up to 100 percent of leniency but with certain conditions. These include the corporation, the amount of additional evidence that the entity provides against the other cartel participants and aid the competition law enforcers. In providing, 233 documents to CCP along with its Leniency Application, Siemens has granted a 100 percent reduction in penalty concerning contravention alleged in the relevant markets of switchgear and transformer. These programs have been used as an effective and low costs investigative tool worldwide; however, Pakistan's leniency regime has not been able to reach that triumph in cracking cartels.

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<sup>9</sup>CCP's Landmark decision-leniency granted to Siemens, to break cartels in switchgear and transformer markets, Islamabad, Apr. 03, 2012.

The CCP as an antitrust body has struggled to restrain the anti-market practices effectively, although it has issued more than 100 orders since its inception totaling over PKR 26 billion in fines. In most cases, violators obtain court stays to avoid paying penalties. Therefore, the powerful businessman and companies flout competition laws and significantly weakening the role of the CCP.

Table 4

*The list of CCP Orders*

Sr. No	Categories	Total	Section of the Act	Nature of Violation
1	Deceptive Marketing Practices	46	Section 37 of the Act	Deceptive Marketing Practices
2	Prohibited Agreement	30	Section 4	Unfair trading conditions, Price Fixation
3	Miscellaneous (Orders on Non-Compliance of Commission's Orders)	1	Section 38 of the Act	For not complying with the conditions of earlier Order
4	Miscellaneous (Actions initiated under MRTPO & Disposed of under the Act by the Commission)	4	Section 5, 6 of the MRTPO	Unreasonably restrictive trade practices
5	Miscellaneous (Interim Orders)	7	Section 10, 20 32 of the Act	Interim Order
6	Miscellaneous (Withdrawal of Complaint/Application)	2	Section 5 and 9, Regulation 4 of the General Enforcement	Exemption Application under Section 5, Section 4 and Alleged Non-Compliance of Regulation 4 of the General Enforcement
7	Miscellaneous (Exemptions)	1	Section 5	Exemption Order
8	Miscellaneous (Orders Passed Pursuant To High Court Directions)	3		
9	Appellate Bench's Orders	6	Section 41 of the Act	Price fixing
10	Abuse of Dominant Position	19	Section 3	Unfair trading conditions, price hike, Refusal to deal Excessive pricing, Tie-in, Refusal to deal etc.
11	Approval of Mergers – Ph I	353	Section 11 of the Act	
12	Approval of Mergers - Ph II	9	Section 11 of the Act	

CCP has issued around 481 orders as is shown by the data on their website. 362 of these are about the approval of mergers. Around 52 are about the deceptive marketing practices. 19 are about the abuse of dominant position and around 30 are about the prohibited agreements. We have taken the sample of 81 orders as we have complete information about these orders. CCP has issued 46 orders related to “deceptive marketing practices” and 30 orders related to “prohibited Agreements” and we have taken 5 deceptive marketing related “miscellaneous orders” as a case. Total 81 orders are taken as a sample.

Table 5

*Notices by Section of the Competition Act*

Section	Orders	Number of Notices Issued
Under Section 4 of the Competition Act 2010	Prohibited Agreement	29
Under Section 37 of the Competition Act 2010	Deceptive Marketing Practices	3
Under Section 37(1) of the Competition Act 2010	Deceptive Marketing Practices	5
Under the provisions of Section 37(2) of the Competition Act, 2010	Deceptive Marketing Practices	44
<b>Grand Total</b>		<b>81</b>

All the prohibited agreement orders are covered under section 4 of the competition act 2010 and deceptive marketing practices are covered under section 37 of the competition act 2010.

Table 6

*Notices by Types of Complainant*

Complaints filed by	Number of Notices Issued
Associations *	6
Citizens of Pakistan **	10
Companies	39
CCP	26
<b>Grand Total</b>	<b>81</b>

\* Association bodies

\*\* Individuals

Most of the complaints are launched the companies against the other companies and the second number of complaints are sue-moto taken by the CCP.

Table 7

*Notices by Sectors*

Sectors	Number of Notices Issued
automobile	5
Construction	2
Contract	1
Education	7
electricity	1
Exploration and production	3
fertiliser and chemical manufacturing	5
Financial institutions	1
FMCG	12
Food	9
Health	3
House hold products	8
Insurance	1
live stock	3
Media	6
online store	2
Pharma	2
Real estate	5
Services	3
Stock market	1
Textile	1
<b>Grand Total</b>	<b>81</b>

Most of the orders and enquires held in FMCG sector related to misleading claims about the products and using the trademark of the other companies. Out of twelve FMCG companies 8 are fined approximately Rs. 270 million.

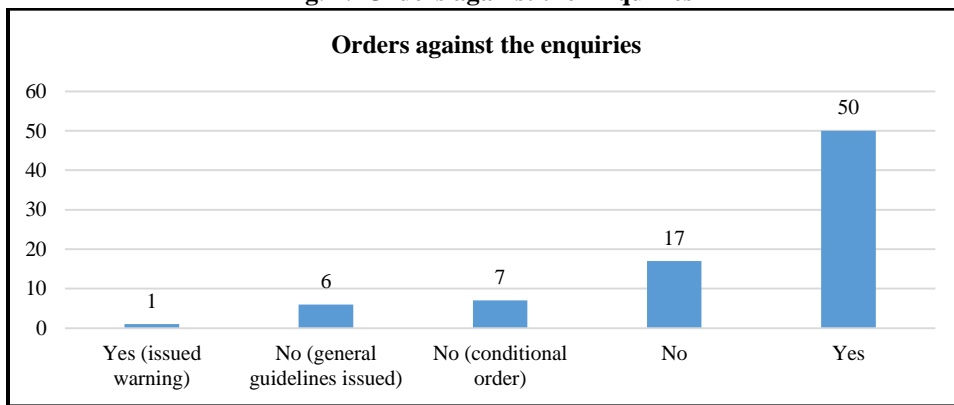
Table 8

*Enquiry Conclusions*

Enquiry Conclusion	Number of Notices issued
Matter needs investigation (commission may proceed the case)	68
N/A*	7
Not found guilty	5
Penalty proposed	1
<b>Grand Total</b>	<b>81</b>

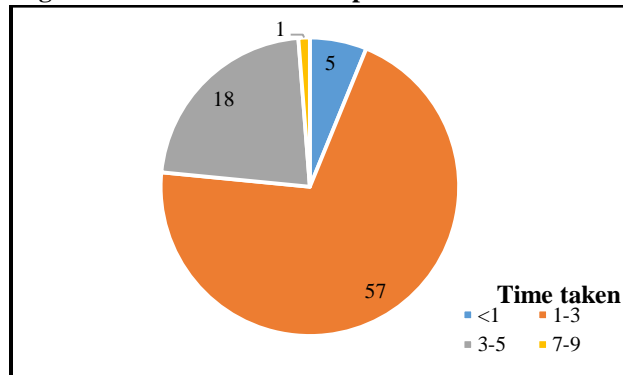
\*Enquiry reports not found.

**Fig. 2. Orders against the Enquiries**



Out of 81 orders enquiry committee suggest investigating the 68 orders for further decision and declare 5 respondents not guilty and proposed penalty in one case. In further investigation CCP has issued 81 orders and impose penalty against 50 complaints and issued on warning on leniency basis. In 30 cases no penalties have been imposed and general guidelines are issued in 6 cases and conditional orders are issued against 7 cases.

**Fig. 3. Time taken from Complaint to Order Issuance**



Most of the enquiries took 1 to 3 years to complete the process from complaint to final decisions and most of the cases resolved in 3 to 5 years. Total fines in the selected cases was approximately Rs. 2143 million and most of the fines are ranging from Rs 250000 to Rs 10 million.

Table 9

*Fines against the Violations*

Fine (in Million)	Fines in millions	Number of Notices issued
0-10	73.75	56
10-20	65	6
20-30	90	4
30-40	95	3
40-50	45	1
50-60	200	4
60-70	64.71	1
100-110	100	1
140-150	140	1
150-160	300	2
200-210	200	1
760-770	770	1
<b>Grand Total</b>	<b>2143.46</b>	<b>81</b>

## 5. CONCLUSION

This study is motivated by the recent literature on market competition from the perspective of declining competition in the domestic and foreign markets in Pakistan. Limited competition has not only inversely impacted the welfare of consumers but also; it has halted the development of a competitive private sector (Khan 2020; Khan 2021). In general, it is highlighted that government intervention in the market, protection to domestic industries, state footprint in the economy, and higher import tariffs are among the leading factors that are restricting competition in markets. For instance, Government of Pakistan is actively intervening in markets like Wheat Market, Sugar Market, Power Sector among others (Salman and Javed 2020; Khan 2020; Khan 2021). Likewise, there is huge foot-print of the state in sectors like power, transport, and industry etc. In addition to limiting competition, state foot-print causes huge losses of the budgetary resources. According to the World Bank, the total liabilities of loss-making State-Owned Enterprises (SOEs) in Pakistan has been ranging from 12 percent to 18 percent of the GDP in recent years. Further, in terms of trade restrictions, Pakistan is currently the world's seventh most protected economy as measured by the Overall Trade Restrictiveness Index. The complexity of the tariff structure is relatively high with tariff lines augmented with para tariffs such as additional duties, regulatory duties and special regulatory orders (Varela et al., 2020). This is creating anti-export bias, limiting competition and hurting the development of private sector. All these imply that competition in the market is needed to resolve the conundrum of Pakistan's faulty private sector and protect consumers from anti-competitive practices.



Given a dismal situation of market competition in Pakistan, three-fold reforms are needed. First, the government needs to reduce the cost of doing business and remove policy distortions to investment, competition, and trade. Second, the government needs to reduce its footprint of inefficient and loss-making State-Owned Enterprises (SOEs) in all sectors, like electricity, transports, and industry. Third, protection to domestic industry should be converted into facilitations in terms of removing infrastructure deficit to businesses. In this regard, the role of competition commission is crucial, especially from the perspective of a robust antitrust framework.<sup>10</sup> In particular, it has to enforce its decision. For example, the Pakistan Poultry Association (PPA), was fined PKR 100 million in 2016 for price fixing, after a PPA didn't pay a similar fine in 2010 for the same violation. There are many other instances in which the CCP could not implement its decision in one way or the other.<sup>11</sup> In order to improve the effectiveness of CCP as an organisation, several plans are tied with certain things like: work on the outcome of court cases; appointment of members to complete the quorum; structural changes for collaborations and regulations for policymaking with Government; online hearings of cases etc.

### 5.1. Way Forward

There several areas where CCP can improve in order to make the market functioning in Pakistan.

- Competition law and policy have to be actively promoted and nurtured as well-designed and effectively implemented competition law and policy provide a level playing field, where economic actors can freely and fairly compete, to the ultimate benefit of the consumer and society.
- Especially, the CCP has to ensure the enforcement of the laws in those sectors of the economy that is deemed as essential for boosting the economic growth and stability of the country.
- The commission team must also include the high-level professionals, with expertise in economics, finance, commerce, law, accountancy, and public administration, rather than only bureaucrats.
- The CCP may also initiate different capacity building program, for example engage with different economic research institutes to have collaborative work on different competition issues. The faculty and students may work, in this regard, on targeted economic research relevant to market and competition. Therefore, the investigation has to be initiated, based on solid economic review of cases that would enhance the efficiency in the CCP work.
- The focus should be on minimum Government interference, as the rules and regulation refrain people to invest in businesses.
- The Commission is expected to monitor the pricing environment for every business and avoid the price-fixing by the leading players not just for private but even for government and semi-government players in the markets.

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<sup>10</sup>BTI,2018.

<sup>11</sup>The effectiveness of antitrust enforcement is well reflected in the perception-based indicators, where Pakistan ranked 70 in 2017-18 as compared to 85 in 2013-14, and 66 in 2007-08.

- CCP has the role of enforcement according to the stated laws and is not responsible for the market's conditions. It acts like a referee that aims to avoid match-fixing. As the market is the backbone of every nation so this element should also be focused by CCP to have fair competition and perfect saturation of the market in addition to ensuring the level playing field and avoid all the stated offensive laws.

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